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Estate Planning By Corporate Fiduciary As An Unauthorized Practice Of Law - Green v. Huntington National Bank

Estate Planning By Corporate Fiduciary As An Unauthorized Practice Of Law

Green v. Huntington National Bank[1]

Members of the Ohio State Bar Association sued to enjoin the defendant bank from providing prospective customers with certain legal services through its trust department. The bank advertised that it was qualified to help the customer set up his estate. When a customer expressed interest, the trust officers examined his insurance, investments, assets, present will and other confidential information and elicited from the customer his desires concerning the disposition of his estate. From this information the trust officers prepared an "estate analysis," which summarized the customer's present situation and suggested a future course of action that would insure the most beneficial testamentary disposition.[2] The lower court dismissed the petition of the plaintiffs, and they appealed for a de novo determination of law and fact based on the evidence presented in the lower court.

The Court of Appeals of Ohio reversed, holding that the bank was engaging in the unauthorized practice of law by providing this service and should be enjoined. The court found no substance to the bank's contention that the estate analysis was in a broad, general form; evidence showed that what the bank called "boiler plate" or standardized provisions were in fact so modified and personalized that they took the form of specific advice of a legal nature detailed to fit the customer's own situation. The court distinguished such individual attention from the more accepted method by which banks operate in this field, *i.e.*, where the bank illustrates the problems of planning an estate by using actual estates already administered or hypothetical facts similar to the customer's situation. Moreover, the effect of the estate analysis was not diminished merely by prefacing it with a statement that the customer should confer with his own lawyer for specific advice and preparation of all instruments. This opinion was subsequently affirmed by the Ohio Supreme Court.

The court in the present case was faced with the difficult problem of drawing the line between accepted business activities and the unauthorized practice of law. Because corporations possess only a legal existence, cannot appear in court *in propria persona,* and are unable to establish a relationship of confidence and intimacy with a client, they are not permitted to practice law or employ attorneys to perform legal services for their customers.[3] Unfortunately, the courts

1. 3 Ohio App. 2d 62, 209 N.E.2d 228 (1964), *aff'd,* 4 Ohio St. 2d 78, 212 N.E.2d 585 (1965).

2. Some analyses, for example, 209 N.E.2d at 232:

(a) suggested wills by both husband and wife, his to include trusts, and hers to take her estate directly to him because the data showed her estate to be small.

(b) suggested use of an *inter vivos* trust and, in one instance, a suggested trust for the benefit of the prospect's father, mother and sister, with an ultimate gift to charity.

3. Merrick v. American Security & Trust Co., 107 F.2d 271 (D.C. Cir. 1939), *cert. denied,* 308 U.S. 625 (1940); Laskowitz v. Shellenberger, 107 F. Supp. 397 (S.D.

have had great difficulty in consistently defining precisely what a corporate fiduciary cannot do, partly because the practice of law is not confined to the courtroom; most of what is commonly considered legal work is done in the office and has little to do with litigation.[4]

When a bank has employed an attorney to take care of such legal work for the customer, courts have either enjoined the bank[5] or declared it in contempt of court.[6] These decisions were evidently precipitated by a judicial fear that the attorney's allegiance would go to his employer, in whose best interests he would act, thereby depriving the customer of independent legal counsel.[7] In *People v. People's Trust Co.*,[8] an early New York case recognizing this element of partiality, the attorney-employee advised the patron and then drafted his will, naming the trust company-employer as executor. The court

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Cal. 1952); *In re* Otterness, 181 Minn. 254, 232 N.W. 318 (1930); N.J. STAT. ANN. tit. 2A, § 170–78 (1953); PA. STAT. ANN. tit. 17, § 1608 (1961). MD. CODE ANN. art. 27, § 14 (1957) reads:

> It shall be unlawful for any corporation or voluntary association to assume, use or advertise in any newspaper, periodical, or by use of any notice, circular, letterhead, card, or in any manner whatsoever, the title of lawyer, or attorney, . . . as to convey the impression that either alone or together with, or by, or through any person, whether a duly and regularly admitted attorney at law or not, it has, owns, conducts or maintains a law office, or an office or facilities for the practice of law, or for furnishing legal advice, services or counsel. It shall be unlawful further, for any corporation or voluntary association to solicit itself or by, or through its officers, agents or employees, employment in connection with the rendition of legal advice, services or counsel of any kind whatsoever. . . . The fact that any such officer, trustee, director, agent or employee shall be a duly and regularly admitted attorney at law, shall not be held to permit or allow any such corporation or voluntary association to do the acts prohibited herein. . . .

Provisions regulating corporate fiduciaries are found in MD. CODE ANN. art. 11, §§ 57–59, 86 (1957). See generally Lewis, *Corporate Capacity to Practice Law — A Study in Legal Hocus Pocus*, 2 MD. L. REV. 342 (1938).

4. New Jersey State Bar Ass'n v. Northern N.J. Mortgage Associates, 32 N.J. 430, 161 A.2d 257 (1960); Land Title Abstract & Trust Co. v. Dworkin, 129 Ohio St. 23, 193 N.E. 650 (1934). In *In re* Opinion of the Justices, 289 Mass. 606, 194 N.E. 313, 317 (1935), it was said:

> Practice of law under modern conditions consists in no small part of work performed outside of any court and having no immediate relation to proceedings in court. It embraces conveyancing, the giving of legal advice on a large variety of subjects, and the preparation and execution of legal instruments covering an extensive field of business and trust relations and other affairs. . . .

But see Atlantic Title & Trust Co. v. Boykin, 172 Ga. 437, 157 S.E. 455 (1931).

5. See People *ex rel.* Committee on Grievances v. Denver Clearing House Bank, 99 Colo. 50, 59 P.2d 468 (1936).

6. See People *ex rel.* Illinois State Bar Ass'n v. People's Stock Yards State Bank, 344 Ill. 462, 176 N.E. 901 (1931).

7. See Groninger v. Fletcher Trust Co., 220 Ind. 202, 41 N.E.2d 140, 142 (1942), where the court stated:

> It is argued that one who is the regular attorney for a trust company will be more loyal to his employer than to the trust for which he is rendering legal services at the instance of his employer. But this assumes that there is a conflict of interests. . . . In such cases, of course, neither the fiduciary nor the attorney for the fiduciary should act for the trust, and courts will see that in such cases disinterested persons are appointed to represent the trust.

ABA: CANONS OF PROFESSIONAL & JUDICIAL ETHICS, Canon 35, states that the professional services of a lawyer should not be controlled by any lay agency which intervenes between client and lawyer and that the lawyer should avoid all relations which direct the performance of his duties by or in the interest of such intermediary. See Opinion 31, OPINIONS OF THE COMMITTEE ON PROFESSIONAL ETHICS AND GRIEVANCES 115 (1957). See generally Note, *The Emergence of Lay Intermediaries Furnishing Legal Services to Individuals*, 1965 WASH. U.L.Q. 313.

8. 180 App. Div. 494, 167 N.Y.S. 767 (1917).

regarded this as a destructive intervention by the company into the necessary relation between attorney and client. "Divided obligations in trust relations are obnoxious to the law, and in none more so than in that of attorney and client."[9]

A more liberal theory has been developed in some states to permit trust companies to perform certain "legal" work ancillary to their fiduciary function.[10] Thus, in *Detroit Bar Ass'n v. Union Guardian Trust Co.*,[11] the court enjoined the company from drafting wills under the *People's Trust* rule, but permitted its attorney-employees to prepare probate papers and conduct probate court proceedings as incident to its legal function of a fiduciary.[12] Under similar reasoning it has been held that although a trust company cannot draw wills for its customers through its employees[13] or charge a fee for legal services rendered,[14] it can in certain circumstances prepare trust agreements or declarations.[15]

A recent Kentucky decision confronted the question of the permissible fiduciary activities of these institutions and attempted to delineate workable guidelines.[16] The court issued an extensive decree specifying fifteen prohibitions[17] and sanctioning twenty-eight activities.[18] Although the case is a forceful attempt to reconcile the conflicting interests of lawyers and bankers, it fails to consider the policies under-

9. *Id.* at 768. See also Canons 35, 47, ABA CANONS OF PROFESSIONAL & JUDICIAL ETHICS. Opinion 41, OPINIONS OF THE COMMITTEE ON PROFESSIONAL ETHICS AND GRIEVANCES 129 (1957), reads: "It is . . . improper for a lawyer to allow his name to appear as a director, officer or employee of a bank or trust company which, in its advertisements, offers to draw wills or trust agreements, give opinions on titles or perform other legal services." *Cf.* Rhode Island Bar Ass'n v. Automobile Service Ass'n, 51 R.I. 122, 179 Atl. 139 (1935).

10. The term "fiduciary" means an executor, administrator, trustee, guardian or other legal representative. See Nelson v. Gossage, 152 Kan. 709, 107 P.2d 682, 685 (1940); *In re* Baker's Estate, 208 Minn. 379, 294 N.W. 222, 224 (1940).

11. 282 Mich. 216, 276 N.W. 365 (1937).

12. See Merrick v. American Security & Trust Co., 107 F.2d 271, 278 (D.C. Cir. 1939), *cert. denied*, 308 U.S. 625 (1940); State Bar Ass'n of Conn. v. Connecticut Bank & Trust Co., 146 Conn. 556, 153 A.2d 453 (1959); Judd v. City Trust & Savings Bank, 133 Ohio St. 81, 12 N.E.2d 288, 294 (1937). *But see* Arkansas Bar Ass'n v. Union National Bank, 224 Ark. 48, 273 S.W.2d 408 (1954). See generally Note, 72 HARV. L. REV. 1334 (1959).

13. See, *e.g.*, Judd v. City Trust & Savings Bank, *supra* note 12.

14. See, *e.g.*, State *ex inf.* Miller v. St. Louis Union Trust Co., 335 Mo. 845, 74 S.W.2d 348 (1934).

15. Merrick v. American Security & Trust Co., 107 F.2d 271 (D.C. Cir. 1939), *cert. denied*, 308 U.S. 625 (1940) (if drawn incident to company's appointments as trustee, providing that company does not solicit such business); Detroit Bar Ass'n v. Union Guardian Trust Co., 282 Mich. 216, 276 N.W. 365 (1937) (if non-testamentary and non-revocable). *But see In re* Eastern Idaho Loan and Trust Co., 49 Idaho 280, 288 Pac. 157 (1930).

16. Frazee v. Citizens Fidelity Bank & Trust Co., 393 S.W.2d 778 (Ky. 1965). *Cf.* State Bar Ass'n of Conn. v. Connecticut Bank & Trust Co., 146 Conn. 556, 153 A.2d 453, 455 n.2 (1959).

17. The prohibitions included the resolution of questions of domicile, drafting of deeds and wills, handling of tax matters and attempts to terminate litigation against the decedent.

18. These included the marshalling of assets of the estate, providing for a prompt protection or disposition of the assets, and demanding the foreclosure of trusts which are in default. It was also required that advertising of the business and financial aspects of their services as executor, trustee, guardian and estate planner be accompanied by a clear statement that all legal implications involved in each service would be handled in cooperation with the customer's own attorney. See Rouse, *What Does the Decision in Frazee v. Trust Companies Mean to the Lawyer and to the Banker*, 29 KY. S.B.J. 5 (1965).

lying the Bar's refusal to permit trust institutions to handle their own fiduciary activities.[19]

The conflict is no less real in the pre-fiduciary or estate planning activity of the trust institution. While the custom of advertising the estate services has not been condemned, the majority of institutions, either in advertisements or prior to consultation, suggest to the customer that he obtain all specific advice from his own attorney.[20] However, what exactly constitutes specific advice remains unclear. In *Merrick v. American Security & Trust Co.*,[21] the court, using the "incidental to business" test of *Detroit Bar Ass'n,* permitted dissemination of advice on revocable and irrevocable trusts, pertinent statutes, life insurance, taxes, etc., so long as the bank did not advise or attempt to influence or guide a customer as to which of several courses he should pursue.[22] In *State Bar Ass'n of Conn. v. Connecticut Bank & Trust Co.*,[23] the court held that the giving of general information concerning the application, scope and effect of various laws and the reviewing of wills and trust agreements were not acts constituting the practice of law. The decisive factor was whether the acts performed were "commonly understood to be the practice of law."[24] On remand, the trial court issued an injunction which provided, *inter alia,* that where the bank gave no specific advice nor charged a fee[25] for general information regarding federal and state tax law, inter vivos and testamentary trusts, wills, etc., or for reviewing existing wills, it was acting primarily for itself in obtaining and holding trust department customers incident to its authorized fiduciary business and therefore should not be enjoined. The appellate court approved this part of the injunction on rehearing as in conformity with its previous mandate.[26]

Another factor which bears upon the finding of unlawful practice is the form which the information assumes. In the present *Green* case,

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19. See generally Jackson, *The Establishment of Cordial Relations Between the Bar and the Corporate Fiduciaries,* 5 LAW & CONTEMP. PROB. 80 (1938); Annot., 69 A.L.R.2d 404 (1960).

20. See, *e.g.,* State Bar Ass'n of Conn. v. Connecticut Bank & Trust Co., 145 Conn. 222, 140 A.2d 863, 866 (1958). The Statement of General Policies of the ABA National Conference of Bankers and Lawyers, reprinted in III MARTINDALE-HUBBELL LAW DIRECTORY 190A (1966), states, "A trust institution has the same right as any other business enterprise to advertise its trust services in appropriate ways. Its advertisements should be dignified and not overstate or overemphasize the qualifications of trust institutions. There should be no implication that legal services will be rendered. . . ."

21. 107 F.2d 271 (D.C. Cir. 1939), *cert. denied,* 308 U.S. 625 (1940).

22. The court found that the defendant advertised in newspapers and booklets that it was qualified to serve as executor, administrator, trustee, etc. Defendant stated the advantages and disadvantages of a corporate fiduciary, its continued existence and experience. The public was invited to consult defendant's trust officers and discuss estate problems. The advertisement expressly stated that defendant did not draw wills. 107 F.2d at 286 n.4.

23. 145 Conn. 222, 140 A.2d 863 (1958), noted in 18 MD. L. REV. 358 (1958).

24. *Id.* at 871. See Frazee v. Citizens Fidelity Bank & Trust Co., 393 S.W.2d 778, 783 (Ky. 1965).

25. The courts in the present *Green* case noted that the payment of a fee was not an essential element in the practice of law, 209 N.E.2d at 230. In any event, commissions the bank later received from an appointment as fiduciary could be considered as consideration for the previous estate planning services. 212 N.E.2d at 587.

26. State Bar Ass'n of Conn. v. Connecticut Bank & Trust Co., 146 Conn. 556, 153 A.2d 453, 457 n.3 (1959).

the bank's argument that it was only educating and offering suggestions was rejected pursuant to a finding of intentional individualization and specification. When the facts disclose such personalized attention, the court might properly grant an injunction.[27] Yet even general suggestions to the patron have been enjoined, on the theory that "whether the report takes the form of suggestions for further study or as a recommendation that the suggestions be subjected to further scrutiny by a lawyer, the fact remains that the client receives advice from defendants and the advice involves the application of legal principles. This constitutes the practice of law."[28] It therefore remains unclear whether the mere existence of suggestions renders the activity unlawful, or whether suggestions are tolerated, provided the bank makes no attempt to influence the customer.

Maryland's attempt to arrive at a workable arrangement is represented by the 1939 Joint Declaration of Principles prepared by representatives of the Bar and the corporate fiduciaries, supplemented in 1947 and 1959.[29] The resolution, similar to the National Conference Group statements,[30] provides in part:

> [A corporate fiduciary] may give information to customers and prospective customers on such matters as Federal and State tax laws, inter vivos and testamentary trusts, wills and other documents and may review and discuss with customers or prospective customers existing or contemplated wills, trust agreements and other documents, where it does not undertake to give *legal advice* to the customers or prospective customers as to such wills, trust agreements or other documents and does not charge a fee. The corporate fiduciary shall, in any case, recommend that the customer or prospective customer consult his or her own personal attorney for legal advice on his or her specific situation and for the preparation of such legal documents as may be necessary.[31]

It appears that by specifying certain subjects on which general advice may be given, the Bar has adopted the "incidental to business" test of *Merrick* and *Detroit Bar Ass'n.* However, the prohibition against "legal advice" raises a question whether the Maryland court would give a liberal construction to that term and hold that an institution's assistance was not within its scope. To date, the term has not been construed.

The resolution also provides that an institution which is asked by the customer to recommend an attorney shall merely submit the names of several in whom it has confidence, leaving the final selection to the customer. Such a method poses as great a danger of partiality as in the cases where the attorney was employed by the bank in the first

27. See Chicago Bar Ass'n v. Financial Planning, Inc., 26 U.S.L. WEEK 2662 (Ch. Ct. of Cook County, Ill. 1958); ABA, Opinion 1959-A, *Estate Planning,* 45 A.B.A.J. 1296 (1959).

28. Oregon State Bar v. John H. Miller & Co., 235 Ore. 341, 385 P.2d 181, 182 (1963).

29. *Directory of Baltimore Lawyers* 12 (1965).

30. Note 20, *supra.*

31. *Directory, supra* note 29, at 14 (emphasis added). *Compare* 46 A.B.A.J. 1031 (1960).

instance.[32] The privilege of being placed on the bank's list of qualified attorneys might reasonably depend upon the attorney's willingness to return the favor by "suggesting" that the bank be named a fiduciary, and the customer would therefore become a victim of reciprocal professional courtesies.

While Maryland's resolution provides some basis for corporate fiduciary-Bar cooperation, one ought not overlook the fact that, like the ABA policy and the body of case law, it is weighted heavily in favor of the legal profession. By directing a campaign against a highly specialized and skilled group, it is possible that the Bar has lost some professional prestige through a lack of public sympathy. The general public views such a campaign not as an attempt to provide more competent public service, but rather as an attempt by the attorney to prevent a loss of business.[33] Moreover, as a result of the marked tendency toward specialization in the law, the majority of attorneys rarely practice in the estate planning field and consequently have less knowledge of the special aspects involved than do the trust institutions.[34] It would seem, therefore, that public policy demands that highly specialized professions such as trust institutions be given license to advise upon matters which would be, in a traditional sense, the practice of law. The intermediate court in the *Green* case recognized this argument, but properly concluded that redefining the concept of the practice of law involved fundamental questions of public policy best decided by the legislature or the state's highest court.[35] The Ohio Supreme Court in its affirmation answered this policy argument, suggesting that the customer would not be prevented from receiving the benefit of the institution's expertise so long as his own attorney worked closely with the institution.[36]

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32. See note 8 *supra* and accompanying text. It is also possible that the argument against attorney-employees has been somewhat attenuated by the Supreme Court's recent approval of group practice. See Brotherhood of Railroad Trainmen v. Virginia *ex rel.* Virginia State Bar, 377 U.S. 1 (1964); NAACP v. Button, 371 U.S. 415 (1963).

33. See Note, 45 CORNELL L.Q. 126, 134 (1959).

34. See generally Joiner, *Specialization in the Law: Control It or It Will Destroy the Profession,* 41 A.B.A.J. 1055 (1955); 107 U. PA. L. REV. 402-04 (1959).

35. 209 N.E.2d at 230.

36. 212 N.E.2d at 588.